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### VIA ELECTRONIC SUBMISSION

Debra A. Carr, Director  
Division of Policy, Planning and Program Development  
Office of Federal Contract Compliance Programs  
200 Constitution Avenue, NW, Room C-3325  
Washington, DC 20210

**Re: Control Number 1250-0003**

Dear Ms. Carr:

This letter responds to the request for written comments concerning the proposal by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) to extend the Office of Management and Budget's approval of the Non-construction Supply and Service Information Collection ("Proposed Notice"). See 76 Federal Register 27670-71 (May 12, 2011, No. 92). While this proposal is couched in terms of a slight modification to the text of the OFCCP's standard Scheduling Letter and associated Itemized Listing used to commence agency audits of employers, the effect of the proposal would be to raise unnecessary hurdles for and place unfair burdens on federal contractors. Such hurdles and burdens would not materially assist OFCCP in its mission, but would be costly to contractors at a time when all employers would prefer to spent their time and resources on growth and job creation. I have practiced employment law representing businesses for nearly 20 years, and I have advised many clients on issues associated with the OFCCP.

In its Proposed Notice, the OFCCP suggests that it is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the compliance and enforcement functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Specifically, I offer the following comments on the Proposed Notice:

A. The Proposed Notice would incorporate a new item into the Itemized Listing, which accompanies all Scheduling Letters. See New Item 8 on proposed Itemized Listing. A contractor would be required to submit copies "your employment leave policies including, but not limited to, policies related to implementing the Family Medical Leave Act, pregnancy leave, and accommodations for religious observances and practices." This new requirement would mean company policies will now be evaluated at the desk audit stage. This new requirement is vague and unduly burdensome. The requirement is vague because it seeks not only the contractor's FMLA, pregnancy and religious accommodation policy, but any policy that is "related to implementing" these policies, which is not defined and would be difficult to define. In addition, the information would have no practical utility for the agency at this stage. Copies of contractor policies would not enhance the quality, utility or clarity of the information collected as it has no connection or tie in with the other statistical information provided in the Itemized Listing. Furthermore, the submission of policies related to pregnancy and religious accommodation and FMLA do not appear to have any correlation to the data gathered or the purposes of Executive Order 11246, the Rehabilitation Act or the Vietnam Era Veterans' Readjustment Assistance Act. This new requirement should be eliminated.

B. The Proposed Notice would require contractors to submit employee activity data regarding applicants, hires, terminations and promotions by job title as well as by job group. See Item 11 on proposed Itemized Listing. Currently, such data were only required to be submitted by job group. This proposed change imposes a significant paperwork burden on contractors by requiring reporting of the same data in two different ways; indeed, this has the potential to double the burden on contractors rather than the OFCCP's stated goal of "minimiz[ing] the burden of the collection of information." Furthermore, the proposed change does not enhance the quality or utility of the information to be collected. Item 11 on the proposed Itemized Listing should be modified to provide: "You should present these data by job group (as defined in your AAP) or by job title."

C. The Proposed Notice would require contractors to identify in their analysis the total number of applicants, hires, individuals promoted and terminated by racial or ethnic

group, no longer by just minority/non-minority and gender. The Proposed Notice would also require contractors to list unknown ethnicity and unknown gender in their analysis. Furthermore, the categories that the OFCCP proposes using are African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White. This proposed change increases the burden on contractors in several ways. It would require contractors to increase their data collection activities to gather information on these racial or ethnic categories. In addition, the categories used here are different from the categories required by the Equal Employment Opportunity Commission in completing the EEO-1 Form each year.<sup>1</sup> Thus, contractors would need to gather multiple sets of data on employees using different categories. This proposed change in the collection of information is not necessary for the OFCCP's compliance mission, will not enhance the quality of information to be collected, and will instead burden contractors with a blizzard of reporting categories and potentially difficulty reporting decisions (For instance, does a contractor need to guess if an employee refuses to self-identify? Does a contractor need to cross-reference employees who are listed in one category for the OFCCP and a different category for the EEO-1?) This proposed change should be eliminated, and contractors should be required to list employees simply by minority/non-minority and gender.<sup>2</sup>

D. The Proposed Notice requires that contractors provide compensation data in the initial response to the Audit Scheduling Letter for every employee as of the nearest February 1, to include race/ethnicity, gender, date of hire, job title, EEO-1 category and job group. See Item 12 on proposed Itemized Listing. The Itemized Listing defines compensation to include base salary, wage rate, bonuses, incentives, commissions, merit increases, locality pay and overtime, separately for each employee. The Itemized Listing would require contractors to submit documentation and policies that explain compensation factors, "particularly those that explain the factors and reasoning used to determine compensation." See Proposed Itemized Listing (Item 12). Further, the data are to be provided electronically. This proposed change to a contractor's reporting requirement is a radical departure from the existing requirement, and would represent an enormous increased burden to contractors in their collection of data. The current requirement is that contractors submit annualized total compensation data by salary range, rate, grade or level, grouped by race/ethnicity and gender, rather than individualized compensation. For a contractor to provide all documents that explain the factors that are used to determine compensation would provide a herculean task – most contractors, indeed most employers, use many factors to set compensation and engage in much reasoning. Those might include performance of the employee, performance of the business and individual group or department, the local, regional and national market

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<sup>1</sup> The EEOC's new categories, as of 2007, are Hispanic or Latino (includes all employees who answer "Yes" to the question, are you Hispanic or Latino?); White (not Hispanic or Latino); Black or African American (not Hispanic or Latino); Native Hawaiian or Other Pacific Islander (not Hispanic or Latino); Asian (not Hispanic or Latino); American Indian or Alaska Native (not Hispanic or Latino); Two or More Races (not Hispanic or Latino)

<sup>2</sup> If racial/ethnic categories will be required, the OFCCP should at the very least use the same categories as those used by the EEO-1 Form.

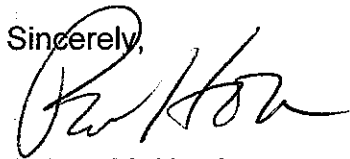
and a variety of other factors and reasoning. Instead of simply submitting compensation levels, contractors would need to engage in a much more intensive collection of data and submission of data. Indeed, the proposed changes would appear to require employers to disaggregate all components of each employee's compensation (e.g. separate base pay from other earning types) and even provide additional detailed variables typically used in a pay regression analysis for every employee (e.g. date of hire). Importantly, the lack of precise definitions used would also cause confusion, waste time, and lead to differing interpretations, which would do nothing to assist the audit process. This data would not, however, assist the OFCCP in its compliance and enforcement functions. The data and policies would be voluminous, but without individual consideration of the factors and reasoning and without interaction with the contractor's managers and HR staff, the documentation and policies contemplated would have no practical utility. It would, however, create a significant burden for contractors.

In addition to the increased amount of data, the proposal also requires that the data be provided "as of February 1<sup>st</sup>". This appears to be an arbitrary date that does not take into account the employer's actual pay administration practices or Affirmative Action Plan Start date.

These proposed changes to information on employee compensation should be eliminated.

It is indeed ironic that the OFCCP suggests that this Proposed Notice is part of its "continuing effort to reduce paperwork and respondent burden." I respectfully suggest that the proposed modifications listed above would have the opposite effect. They increase paperwork and the burden on contractors for no discernable benefit. I respectfully request the OFCCP reconsider its proposal.

Sincerely,



Robert M. Howie  
of  
RIDDELL WILLIAMS P.S.

RMH